



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

February 25, 1997

The Honorable Ken Armbrister
Chair, Committee on State Affairs
Texas State Senate
P.O. Box 12068
Austin, Texas 78711

Letter Opinion No. 97-012

Re: Whether the Edwards Aquifer Authority is authorized to borrow funds to cover a shortfall of operating funds and to repay the loan from permit fee revenues (ID# 39357)

Dear Senator Armbrister:

You ask about the authority of the Edwards Aquifer Authority to borrow funds. You explain that the authority would like "to borrow funds to meet an anticipated shortfall of operating funds in fiscal year 1996-1997. This loan would be from a private financial institution or other lender and would be repaid from permit fee revenues the Authority will collect later in 1997." You specifically ask if the authority may "borrow funds for operating expenses during its initial year of operation and pledge anticipated fee revenues for repayment of this loan" pursuant to "its enabling legislation and subsequent amendment."

The Edwards Aquifer Authority was created by the legislature in 1993 as a conservation and reclamation district under article XVI, section 59 of the Texas Constitution. Its enabling act, Act of May 30, 1993, 73d Leg., R.S., ch. 626, 1993 Tex. Gen. Laws 2350, 2350 (*as amended by* Act of May 29, 1995, 74th Leg., R.S., ch. 261, 1995 Tex. Gen. Laws 2505, 2505 (amending section 1.09 of 1993 enabling act and adding sections 1.091 - .093)), expressly permits the authority to receive loans "for use in carrying out its powers and duties," *id.* § 1.11(d)(4), at 2358. The enabling act also provides that the authority has "all of the rights, powers, privileges, authority, functions, and duties provided by the general law of this state, including Chapters 50, 51, 52, Water Code, applicable to an authority created under Article XVI, Section 59, of the Texas Constitution," *id.* § 1.08(a), at 2356. Chapter 52 of the Water Code has been repealed and recodified as chapter 36 of the Water Code.¹ Chapter 36 contains the following provision:

§ 36.157. Repayment of Organizational Expenses

(a) A district may pay all costs and expenses necessarily incurred in the creation and organization of a district, including legal fees and other incidental

¹ Act of May 29, 1995, 74th Leg., R.S., ch. 933, §§ 2 (amending Water Code title 2 by adding subchapter E, which includes section 36.157), 6 (repealing Water Code chapter 52), 1995 Tex. Gen. Laws 4673, 4692, 4701.

expenses, and may reimburse any person for money advanced for these purposes.

(b) Payments may be made from money obtained from the sale of bonds first issued by the district or out of maintenance taxes or other revenues of the district.

Water Code § 36.157.² The effect of this language is to authorize a district to use any revenues to repay advances for expenses incurred in its creation and organization.³ Although this provision does not use the term “loan,” the phrase permitting a district to “reimburse any person for money advanced for these purposes” appears to contemplate that the district is authorized to obtain a loan to cover organizational expenses. In addition, as noted above, the authority’s enabling act expressly authorizes it to receive loans to carry out its powers and duties. Therefore, we conclude that the authority may borrow funds to cover a shortfall of funds needed to organize⁴ the authority and repay the loan from permit fee revenues⁵ pursuant to its enabling act and Water Code section 36.157.

We note that article XVI, section 59 of the Texas Constitution provides that the legislature shall not provide for any indebtedness against a district “unless such proposition shall first be submitted to the qualified property tax-paying voters of such district and the proposition adopted.” Tex. Const. art. XVI, § 59(c). The authority’s enabling act was not subject to voter approval.⁶ This constitutional limitation, however, applies to indebtedness that is serviced by a tax. Bonds, notes, and other debts payable out of revenues, which are not serviced by a tax, do not constitute an indebtedness under article XVI, section 59. See generally *Lower Colorado River Auth. v. McGraw*, 83 S.W.2d 629, 633 (Tex. 1935); see also *Brazos River Conservation and Reclamation Dist. v. McGraw*, 91 S.W.2d 665, 672 (Tex. 1936). Because the authority permit fees appear to be intended to regulate use of the aquifer and to subsidize the cost of that regulation rather than merely to raise

²This provision is nearly identical to now-repealed Water Code section 52.261, which was in effect in 1993 when the authority’s enabling act was enacted. See former Water Code § 52.261, enacted by Act of May 8, 1985, 69th Leg., R.S., ch. 133, § 5.01, 1985 Tex. Gen. Laws 617, 650, repealed by Act of May 29, 1995, 74th Leg., R.S., ch. 933, § 6, 1995 Tex. Gen. Laws 4673, 4701.

³See *Creedmoor Maha Water Supply Corp. v. Barton Springs-Edwards Aquifer Conservation Dist.*, 784 S.W.2d 79, 87-88 (Tex. App.—Austin 1989, no writ) (district authorized to use user fees to repay cities for organizational expense advances under former Water Code section 52.261).

⁴In your request, you describe the expenses at issue as first year operating expenses. We assume that these expenses are initial organizational expenses. The determination whether particular expenses may be categorized as organizational expenses would involve questions of fact and would be beyond the purview of an attorney general opinion.

⁵We address only whether the authority may use permit fee revenues to repay loans. We do not address whether the authority may pledge or dedicate specific future revenues.

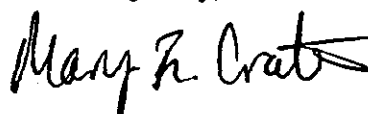
⁶Act of May 30, 1993, 73d Leg., R.S., ch. 626, § 1.02(a), 1993 Tex. Gen. Laws 2350, 2351 (“A confirmation election is not necessary.”).

revenue,⁷ we do not believe that the permit fees constitute a tax. For this reason, nothing in article XVI, section 59 prohibits the legislature from authorizing the authority to use permit fee revenues to service a debt.

S U M M A R Y

The Edwards Aquifer Authority is authorized to borrow funds to cover a shortfall of funds needed to organize the authority and to repay the loan from permit fee revenues pursuant to its enabling act and Water Code section 36.157.

Yours very truly,



Mary R. Crouter
Assistant Attorney General
Opinion Committee

⁷See *Creedmoor Maha Water Supply Corp.*, 784 S.W.2d at 81-82 ("If the 'primary purpose' of the charges is to raise revenue, as opposed to subsidizing the cost of regulation, the charges in question must amount to taxation.") (holding that former Water Code ch. 52 user fee was regulatory fee rather than tax); see also *Conlen Grain & Mercantile, Inc. v. Texas Grain Storage Producers Bd.*, 519 S.W.2d 620 (Tex. 1975). For provisions regarding Edwards Aquifer Authority permit